Licensing Of The Lower 80 And General Category Channels

The Commission's belief that a geographic licensing approach on the Lower 80 and the General Category channels "will afford smaller SMR operators the flexibility to provide service to a defined geographic area on the same basis as licensees in the upper 10 MHz block" is belied by the Commission's own records of the extent of existing licensing of the lower channels.[3] The extent of the waiting list for SMR channels demonstrates that in every market of any substantial size, there is no Lower 80 channel available at any commercially useful site.

Applicants for commercial service channels can be expected to request authority to operate at a commercially useful site, that is, a site from which they can expect to be able to provide a useful signal to a large enough population base to justify the cost of constructing and operating a system. Some of the applications on the waiting lists have been there for more than ten years. Over that time, persons desiring to provide commercial service can be expected to have searched out every location from which they might have provided a profitable service to a market. The existence of waiting lists for substantially all areas of the

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[3] Commentors do strongly support any effort taken by the Commission to provide complete regulatory parity for lower channel operators, removing all rules which would stand in the way of unfettered trunking and use of the channels to enable such operators to employ the channels in a more efficient manner. All such channels should be freely available for provision of commercial service to all persons in whatever configuration the operator deems appropriate to serve the market. Therefore, the outdated concept of "conventional" versus "trunked" channels should be rejected, including designations such as conventional business versus conventional industrial, etc. The preferred outcome would be one that places all non-wide area licensees in a position of regulatory parity with wide-area licensees to the fullest extent possible.

United States demonstrates that there is hardly any geographic area into which a person could expand a commercially viable service on the Lower 80 and General Category channels.

Were the Commission to review its licensing records for any market it selected at random among the Top 100 EAs, Commentors are confident that it would find that there is no commercially useful location at which an applicant could construct and operate a new station on the Lower 80 channels. The situation can only be expected to worsen as Lower 80 and General Category channels are used by EAs as relocation channels, thereby increasing further the extent of their use in every EA. Given the unavailability of any place on which an applicant for a new station could stand, the Commission's expectation that the lever of geographic licensing can move the earth is not reasonable.

The incumbent licensee situation on the General Category channels is similar, with no commercially useful site remaining on those channels in almost any market. To assure itself of that fact, the Commission should conduct a small study of a selected number of EAs and determine whether the facts support its belief that geographic licensing of the General Category channels would facilitate any additional service. Absent such a study, the Commission would not be engaged in reasoned decision making, supported by its own records. Instead, it would merely be employing wishful thinking or best guesses as to the actual outcome of its actions.

There is an additional reason that the Commission cannot reasonably expect that wide area operations will develop on the lower channels. If the EA licensees are to provide incumbent licensees with comparable facilities on a mandatory basis, it is only the Lower 80 and the General Category channels which the EA licensee can use to relocate the incumbents. Therefore, the Commission must expect that the EA licensees would be the persons most interested in acquiring licenses for the lower channels. Even were the Commission to reallocate the lower channels to wide area operation, it must expect actually to see them used, instead, by incumbents for site-specific operations, and not for wide area operation.

Commentors respectfully suggest that the proposal to license the Lower 80 and the General Category channels on a geographic basis is auctioning run riot. Before taking any step toward an auction for the lower channels, the Commission should consider whether it can expect to receive bids of sufficient value even to justify the cost of conducting the auction. Commentors suggest that the number of EAs in which bids would either be non-existent or counter productive for the Commission would be overwhelming. Accordingly, Commentors suggest that the public interest would be better served by continuing site-specific licensing for the lower frequencies.

As a basis for its proposal, the Commission stated only a belief that is not supported by fact. Because there is no evidence that the public interest either requires or would be served in any way by the proposal to license the lower channels on a geographic basis, the Commission should abandon that proposal forthwith and forever.

## Channel Assignments

The Commission's proposal to license all 150 General Category channels on an EA basis is entirely unreasonable. While "licensees may be interested in establishing multiple-channel system networks," FNPRM at para 301, licensing of the 150 General Category channels in a small number of large blocks cannot reasonably be expected to accomplish that objective for any licensee in any EA. The Commission's licensing records do not support a conclusion that it would be possible for a licensee to establish commercially practicable wide area operations on more than a tiny percentage of the General Category channels in any EA, and the channel groupings on which wide area operation might be possible would differ from market to market. The Commission's concern that "the competitive bidding process for these frequencies may be administratively unmanageable if they are licensed on a channel-by-channel basis," *id.*, is not reasonable.[4] The Commission contracts out to experts the mechanics of conducting its competitive bidding processes. The costs of that process could all be passed on to the bidders in the charges made to allow bidders access to the auction. If there is anything to be gained by licensing the General Category channels on a geographic basis, and Commentors contend that there is not, the only gain for the Commission and the public will come from licensing the channels on a channel-by-channel basis. The

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[4] Commentors respectfully note that the Commission's efforts in this entire proceeding are, upon reconsideration, likely to be found to be administratively unmanageable. Further scrutiny of the Commission's Report and Order should result in that conclusion. Accordingly, it is logically inconsistent for the Commission to claim, on the one hand, that relicensing and relocating and reprogramming and recombining thousands of transmitters and hundreds of thousands of end units is feasible, while on the other hand, this comparatively smaller task is administratively unmanageable.

Commentors respectfully suggest that the public interest would be served best by continuing to license the General Category channels on a site-specific basis.[5]

Co-Channel Interference Protection

The Commission proposed, at paragraph 318 of the FNPRM, to establish certain co-channel protection requirements on the lower channels. Review of the Commission's records will demonstrate that there are numerous instances in which the Commission has inadvertently authorized co-channel stations on the Lower 80 channels at less than the minimum distance permitted by the Commission's Rules, without the applicant's having supplied an engineering study. As the Commission is aware, there was also a period during which frequency coordinating committees were not communicating their General Category coordinations to one another. As a result, in numerous instances, the Commission inadvertently granted exclusive use of a channel to more than one licensee in the same area. If the Commission were to have any possibility of providing competitive bidders with "marketable title" to the lower channels, it is incumbent upon the Commission to review its licensing records on the lower channels with great care and correct any and all licensing errors which it finds on those channels, well in advance of accepting applications for geographic area licenses.

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[5] The extent of existing licensing on those channels suggests that there is not all that much more work remaining for the Commission in licensing the last available and commercially practicable sites in many EAs. Accordingly, the Commission cannot be expected to save much administrative effort by converting the General Category channels to geographic licensing.

Congress has given the Commission substantial relief in correcting such errors in the Telecommunications Act of 1996 (the "1996 Act"). The Commission's 800 MHz band geographic separation rule, 47 C.F.R. §90.621, was adopted to prohibit interference between stations. The numerous, recent grants of improperly short-spaced stations will assuredly result in interference to other incumbent licensees. The 1996 Act revised Section 303(f) of the Communications Act of 1934, 47 U.S.C. §303(f), to allow the Commission to resolve interference problems by modifying licenses with respect to frequencies, power and hours of operation without requiring the holding a public hearing. Accordingly, the Commission should review its records carefully and modify all improperly granted short-spaced authorizations to delete the improperly short-spaced frequencies from the licenses.[6]

To date, the Commission has been willing to correct the administrative errors which exist in its data base, resulting from the granting of improperly short-spaced licenses. Although the Commission's willingness has been welcomed by licensees whose rights have been threatened by the existence of these errant grants, Commentors note that such activity has only occurred on a case-by-case basis, in response to individual complaints. Accordingly, the Commission's efforts to date have been piecemeal, without any comprehensive effort to rid its data base of all such offending grants. Prior to holding any auction, the Commission must first correct its records to assure that the claimed level of

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[6] If the Commission were not confident of its authority to correct its own administrative errors without any kind of a hearing, the Commission may desire to follow a procedure similar to one which it has applied in the FM Broadcast field, namely, issuing an order to show cause why each improperly granted authorization should not be modified.

activity units is correct for calculation upfront payments and minimum bidding, to assure that no operator is allowed to rely on improperly granted licenses in its bidding strategy, and to assure that no bidder is unjustly enriched via the proposed process.

Additionally, the Commission should now review its data base to set aside all grants which were not supported by the Commission's rules regarding presentation of proper engineering studies. That such grants have occurred thus far is certainly unfortunate. That such applications were ever accepted for filing was devastating to the industry, chilling the availability of channels to curtail the growth of many, many affected operators. The case law in this area is quite clear regarding the submission of applications which do not demonstrate good faith preparation by the applicants. To achieve fidelity to its administrative processes and to avoid rewarding those persons who engaged in such activity for the purpose of engaging in spectrum warehousing, speculation and anticompetitive activity, the Commission should take this opportunity to correct these past wrongs by, at the least, deleting all such grants from its data base.

Commentors further question the qualifications of the above described abusers of the Commission's processes to participate in the proposed auctions. The Commission has long held that persons who pack a lottery or engage in collusion or take some other action to abuse the Commission's processes should be punished by precluding those abusers from taking advantage of future opportunities, particularly those opportunities which were the obvious goal in the original abuse. Such an enforcement history has enabled the Commission

to enforce fidelity to its rules and processes and has been effective in assuring the public that those persons who participate in its processes are faithful to the public trust attendant with the grant of an authorization. The Commission should do no less in this proceeding and should disqualify those entities who have engaged in this activity from participation in the proposed auctions of 800 MHz spectrum.[7]

Operational And Eligibility Restrictions

Commentors are confident that the Commission will not adopt a geographic licensing scheme for the lower channels. However, in an abundance of caution, Commentors will discuss additional issues raised by the FNPRM.

To assure that the lower 80 channels are actually able to serve as an entrepreneur's block, the Commission should refuse eligibility for the Lower 80 channels for any person which holds an EA license for more than 20 channels in the same EA. Such a restriction will, first, assure that the channels will be available only to small entrepreneurs and, second, help assure that the channels are actually used for wide area service, rather than being acquired by large EA licenses for the purpose of diverting them to trading stock, trading them to incumbents for use on a site-specific, rather than a geographic area, basis.

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[7] See, Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, 31 RR2d 317 (1974); Coastal Electronics Co., 28 RR 2d 747 (1973); Carol Music, Inc., 4 RR 2d 188 (1964); Abuses of the Commission's Processes by Broadcast Applicants (Section 403 Inquiry re Dr. Bernard Boozer), 65 RR 2d 91 (1988); and ASD Answer Service, Inc.

It is clear from review of the 900 MHz SMR bidding to the date of these Comments that whatever the Commission did in the 900 MHz band to provide opportunities for small businesses and to assure diversity of licensing holding, it was not effective.[8] The results of the lottery to date show intense concentration, with more than 75 percent of the high bids accounted for by the ten percent of bidders in control of the greatest amount of population, SMR Auction Summary Statistics published on the Internet by Telecommunications Research, Inc. If the Commission is actually to fulfill its Congressional mandate, it is will have little choice but to designate the lower channels as entrepreneur's blocks.

There are additional competitive benefits to the creation of entrepreneur blocks for this purpose. It is beyond doubt that the Commission's decisions within its Report and Order will diminish the competitiveness of small business at 800 MHz. No other logical conclusion is possible and the Commission has not suggested within its Report and Order any contrary expectation. If, upon reconsideration, the Commission continues to forward an agenda of promoting competition among only the largest carriers, to the detriment of the competitiveness of smaller carriers, by adhering to its decisions within the Report and Order, the Commission may ameliorate some of the natural injury to small business by providing necessary protections in the lower 800 MHz channels.

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[8] A review of the bids within that auction will demonstrate that even when a small business was also the incumbent within an MTA, those small businesses still could not compete at auction against the resources of large, committed companies which sought dominance.

## Competitive Bidding Issues

At paragraph 333 of the FNPRM, the Commission proposed to group the Lower 80 channels into regions or to auction some markets before others. Reserving Commentors' position that conducting an auction for the lower channels is likely to be counter productive, Commentors suggest that the Commission would do best to auction each five channel block in each EA separately. Given the present circumstance of intense incumbent licensing, the Commission would have no reliable way of assuring that any certain geographic or market-size grouping would be likely to correspond to the way in which the marketplace would actually choose to bid the full value of the channels. To receive the fullest recovery of a portion of the value of the spectrum from bidders, the Commission should not group the Lower 80 channels by any means other than 16 five-channel groups.

There is no obvious justification for the Commission's proposal to license the General Category channels in blocks of 120, 20, and 10 channels.[9] While an applicant may desire to obtain contiguous spectrum, there can be no assurance that any particular pre-defined and nationwide blocking of channels would correspond to the way in which the applicants would value the spectrum most highly in any certain market. For example, there might be 20 useable, contiguous channels in Market A, but those same 20 channels might be heavily

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[9] Commentors further note that aggregation of channels into larger blocks creates the adverse consequence of effectively precluding meaningful participation by smaller operators. Under the right circumstances, smaller operators might be willing to commit to construction of five channels across a geographic area, but if required to make the commitment for larger blocks, it is far less likely that small operators will realistically be able to provide such a commitment.

encumbered in Market B, although a different block of 20, partly overlapping, channels was attractive in Market B. The Commission should leave to the bidders the blocking of contiguous spectrum in each market, because the Commission's blocking the channels in any way at all would be likely to frustrate the public interest in competitive bidding and expediting the greatest amount of competitive service to the public.

While the Commission must always be concerned about administrative efficiency, conducting an auction for 150 separate channels in each of 175 markets need be no more burdensome for the Commission than auctioning one block of 150 channels nationwide. The Commission customarily hires an outside contractor to conduct the auction, and its charges can be fully amortized by adjusting the charges made to applicants for their participation in the auction.[10]

Upfront Payments

The Commission should set the amount of the upfront payment at a level sufficient to discourage frivolous bidders in the auction process.[11] However, the Commission should adjust the amount of the upfront payment to reflect the relative value of the spectrum being

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[10] The Commission could easily adjust the per minute rate for use the 900 Service bidding number, FCCAUCTION, to recover the full costs of its hiring the auction contractor.

[11] As explained, *supra*, speculation on the value of a channel at a Commission auction may be found to be in the public interest because it recovers for the treasury the greatest percentage of the full value of the spectrum.

auctioned. The Commission has determined that it should require an upfront payment of $2,500 for the 900 MHz band SMR auction and for the 800 MHz SMR band Upper 200 channels auction. The Commission recognizes, however, that the Lower 80 and the General Category channels on not of the same value at auction as the Upper 200 channels. Given the extent and diversity of incumbent licensing, there is not likely to be any market in which 10 contiguous General Category channels or ten non-contiguous Lower 80 channels would be worth anywhere near the value of 10 contiguous 900 MHz or Upper 200 channels. Accordingly, the Commission would not act reasonably were it to require the same minimum "ante" from an applicant for the lower channels as it has for other, higher frequency, higher valued channels. While the Commission may not need to obtain mathematical exactitude in its determination of a minimum upfront payment, the requirement of reasoned decision making would appear to compel the Commission to set a different, lower value for the lower channel upfront payment and to set forth the basis for its conclusion.

The 1996 Act mandated the creation of the Telecommunications Development Fund. Section 707 of the 1996 amended Section 309(j)(8) of the Communications Act of 1934, to add a new subparagraph, which provides that

> any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury),

47 U.S.C. §309(j)(8)(c). The 1996 Act also added a provision requiring that "the Fund shall maintain its accounts at a financial institution designated for purposes of this subsection by

the Chairman of the Board [of the Fund] (after consultation with the Commission and the Secretary of the Treasury)", 47 U.S.C. §309(j)(8)(d). Until such time as the Commission has consulted with the Secretary of the Treasury and with the Chairman of the Board of the Telecommunications Development Fund and the required accounts have been established, the Commission should defer any auction requiring the collection of payments required for the qualification of bidders.

Minority- and Women-Owned Businesses

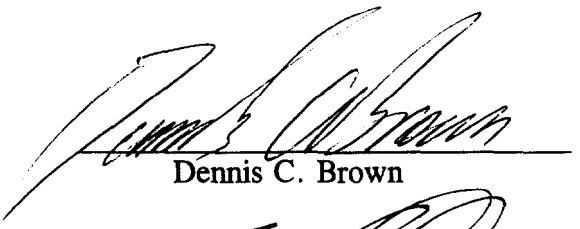
Congress required the Commission to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provision of spectrum-based services," 47 U.S.C. §309(j)(4)(D). While the Supreme Court has held that a test of strict scrutiny will be applied to racial classifications imposed by the federal government, that does not relieve the Commission in any way from the mandate of Congress. The Court might ultimately strike down either the Commission's rules or the applicable statute, but until such time, the Commission's duty is to carry out the instructions of Congress. In carrying out the mandate of Congress, the Commission should be judged as it judges licensees with respect to providing opportunities for women and minorities, namely, not solely by the measure of its success, but also by a measure of its efforts. It does not appear from the FNPRM that the Commission has made any effort, whatsoever, to craft a regulatory scheme that can be relied upon to provide the mandated opportunities. Accordingly, Commentors urge the Commission to take all steps necessary to design a regulatory scheme for the lower channels

that will provide the ordered opportunities specifically for businesses owned by women and by minorities.

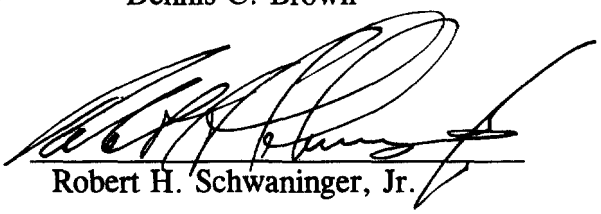
## Conclusion

For all the foregoing reasons, Commentors suggest that the Commission amend its rules as suggested herein.

Respectfully submitted,
FRESNO MOBILE RADIO, INC.
et al.



Dennis C. Brown



Robert H. Schwaninger, Jr.

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Dated: February 15, 1996

Attachment I

# THE COMMENTORS

## California

Fresno Mobile Radio, Inc. of Fresno, California
Madera Radio Dispatch, Inc. of Madera, California
Applied Technology Group, Inc. of Bakersfield, California
G & K Rentals of Bakersfield, California
Alpha Radio Service of Bakersfield, California
Cumulous Communications Corporation of Fresno, California
Mobile Communications, Inc. of Merced, California
L. Clarke Phillips of Chicago Park, California
McGee Communications Electronics, Inc. of Stockton, California
Ray's Radio, Inc. of Modesto, California
Eden Communications, Inc. of Salinas, California
X.W. Corporation d/b/a John Mitchell Company of Fullerton, California
Mobile U.H.F., Inc. of Garden Grove, California
A-1-A Security & Communications of Westminster, California
Radiowave Communications, Inc. Of Long Beach, California
Anderson Communications Corporation of Palm Desert, California
Wise Electronics, Inc. of Brawley, California
Communications Licensing Consultant of San Diego, California
John Cook of Escondido, California
Peak Relay of Valley Center, California
Hi-Desert Communications of Hesperia, California

## Washington State

Radio Link Company of Seattle, Washington
Columbia Communications, Inc. of Kennewick, Washington
Spectrum Communications, Inc. of Moses Lake, Washington
Americell Communications of Wilbur, Washington
Whisler Communications of Olympia, Washington
Spokane Paging & Telecommunications, Inc. of Spokane, Washington

## Oregon

Silke Communications, Inc. of Eugene, Oregon
Starfone of Medford, Oregon

**Arizona**

Pro Tec Mobile Communications, Inc. of Casa Grande, Arizona
Gila Electronics of Yuma, Arizona
Durham Communications, Inc. of Mesa, Arizona
Joriga Electronics of Tempe, Arizona

**Nevada**

Advanced Communications, Inc. of Sparks, Nevada
Bill Ashby of Sparks, Nevada
Cindy McGee of Reno, Nevada

**Utah**

GSC Electric & Communications of Kearns, Utah

**New Mexico**

Specialty Communications of Albuquerque, New Mexico

**Colorado**

Omni Range Communications of Aurora, Colorado
Bran-Dex Wireline Services, Inc. of Sterling, Colorado

**South Dakota**

Communications Center, Inc. of Pierre, South Dakota
Dakota Electronics of Aberdeen, South Dakota
Vantek Communications of Sioux Falls, South Dakota

**Nebraska**

Mobile Communications, Inc. of Omaha, Nebraska
D & D Communications of Lincoln, Nebraska

**Oklahoma**

Dave Fant Company d/b/a Oklahoma Radio Systems of Oklahoma City, Oklahoma
Leon's Radio, Inc. of Oklahoma City, Oklahoma
Total Com, Inc. of Enid, Oklahoma

**Texas**

CommNet Communications Network, Inc. of Dallas, Texas

**Wisconsin**

Viking Communications, Inc. of Milwaukee, Wisconsin
Communications Electronics of Fond du Lac, Wisconsin
Air Communications of Central Wisconsin, Inc. of Wisconsin Rapids, Wisconsin
JSM Systems, Inc. of Sheboygan Falls, Wisconsin
4X Corporation of Appleton, Wisconsin
Nielson Communictions, Inc. of Green Bay, Wisconsin
Camel Communications, Inc. of Cedarburg, Wisconsin
Milwaukee Repeater Service, Inc. of West Allis, Wisconsin
Concept—20 Communications, Inc. of Salem, Wisconsin
Bandt Communications, Inc. of Janesville, Wisconsin

**Illinois**

Supreme Radio Communications, Inc. of Peoria Heights, Illinois
Craig Antenna Service of Pana, Illinois
Stateline Communications, Inc. of Orangeville, Illinois

**Michigan**

DeltaCom, Inc. of Detroit, Michigan
Electronic Communications Company of Detroit, Michigan
Midcom Service of Muskegon, Michigan
General Communications Company of Grand Rapids, Michigan
Johnson Repeater Company of Gaylord, Michigan
Kay Communication of Saginaw, Michigan
State Systems Radio, Inc. of Kalamazoo, Michigan
Ernst Concrete & Supply Company of Warren, Michigan

**Indiana**

Mobile Communications Corporation of South Bend, Indiana

**Ohio**

Domer Communication, Inc. of North Canton, Ohio
E.A. Henson of North Canton, Ohio
Donald R. Nelsch d/b/a Donnel Communications of North Canton, Ohio
Omnicall of Columbus, Ohio

**Kentucky**

C&C Communications of London, Kentucky

**Tennessee**

Billy Rutledge of Bluff City, Tennessee

**Pennsylvania**

Robert J. Fetterman d/b/a R.F. Communications of Catawissa, Pennsylvania
Communicom of York, Pennsylvania
Baycomm, Inc. of Paoli, Pennsylvania
Centre Communications of Bellefonte, Pennsylvania

**Delaware**

Baycomm, Inc. of Bear, Delaware
American Industrial & Marine Electronics of Dover, Delaware

**Maryland**

Charles C. Stull of Frederick, Maryland
Ed Lachowicz of Lutherville, Maryland
Frank Savarese of Lutherville, Maryland
LP Communications of Lutherville, Maryland
Commercial Electronics Services, Inc. of Waldorf, Maryland
C & H Electronic Services, Inc. of Waldorf, Maryland
Two-Way Radio, Inc. T/A TWR Communications of Cumberland, Maryland
Action Radio of Wheaton, Maryland

**Virginia**

Mid Atlantic Communications, Inc. of Fredricksburg, Virginia
LandAir Communications & Electronics, Inc. of Virginia Beach, Virginia
Business Autophones, Inc. of Roanoke, Virginia
Valley Communications of Union Hall, Virginia
Specialty Electronics Systems Company, Inc. of Lynchburg, Virginia
Piedmont Electronics Company of Charlottesville, Virginia
VA-KY Communications of Wise, Viginia
LMR International, Inc. of McLean, Virginia
Professional Communications of Blacksburg, Virginia
Linden SMR Associates of Front Royal, Virginia
Atlantic Communications, Inc. of Newport News, Virginia
Valley Two Way, Inc. of Winchester, Virginia

**North Carolina**

Professional Communications, Inc. of Fayetteville, North Carolina
Golsboro Communications of Goldsboro, North Carolina

**South Carolina**

CoastCom, Inc. of Garden City, South Carolina
Riley's Communications, Inc. of Newberry, South Carolina

**Georgia**

Donald Arsenault of Gainsville, Georgia

**Florida**

Communications Service Center of Bradenton, Florida
Lynn D. Clark of Venice, Florida

**New York**

T & K Communications, Inc. of Owego, New York
Gennesee Business Radio Systems, Inc. of Rochester, New York
Allstate Mobile Communications Corporation of Rochester, New York
JPJ Electronic Communications, Inc. of Yorkville, New York
Furman Communications, Inc. of Savannah, New York
Bush Electronics, Inc. of Liverpool, New York
Metro Electronics Service of Western New York, Inc. of Cheektowaga, New York
Central Radio Communications Corporation of Deer Park, New York
Cellular Design Corporation of Deer Park, New York
Mobile Radio Network, Inc. of North Babylon, New York
FM Communications of Tonowanda, New York

**New Jersey**

Waxman Communications Corp. of Lindenwood, New Jersey

**Connecticut**

Utility Communications, Inc. of Hamden, Connecticut